Supreme Court, U. S.
FILED
MAY 6 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1397

CITY OF KANSAS CITY, MISSOURI,
Appellant,

vs.

ROBERT J. DARBY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

THOMAS W. TIERNEY
DONALD V. PIERCE, JR.
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
Telephone: (816) 421-4334
Attorneys for Appellee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, Appellee moves the Court to dismiss this appeal from the judgment and order of the Supreme Court of Missouri upon the grounds that said appeal is not within the jurisdiction of this Court and that the questions on which the decision of the lower Court rests do not present a substantial federal question.

In the alternative, Appellee moves the Court to affirm the aforementioned judgment and order on the ground that the questions on which the decision of the cause depends are quite limited in scope and have been thoroughly considered by the Supreme Court of Missouri, thereby requiring no further argument.

JURISDICTION

Appellant has sought to invoke the jurisdiction of this Court in accordance with the provisions of 28 U.S.C. 1257 (2). However, as is evident from the decision of the Supreme Court of Missouri (Juris. Statement, Appendix "A" p. 26) from which this appeal has been taken, the case of *City of Kansas City* v. *Darby*, does not draw into question the validity of a Missouri statute or ordinance "on the ground of its being repugnant to the Constitution, treaties or laws of the United States". 28 U.S.C. 1257(2). Accordingly, the questions presented by this appeal, standing alone, cannot be subject to review by this Court by way of an appeal. *DeBacker* v. *Brainard*, 396 U.S. 28, 32, 90 S.Ct. 163, 24 L.Ed.2d 148, 153 (1969); *Live Oak Water Users' Association* v. *Railroad Commission of California*, 269 U.S. 354, 46 S.Ct. 149, 70 L.Ed. 305 (1926). Therefore, appellee submits that said appeal should be dismissed.

STATEMENT

The facts comprising the basis of this appeal are correctly presented in the City Attorney's Jurisdictional Statement under the heading "Statement". The opinions of the Municipal Court of Kansas City, Missouri, the Circuit Court of Missouri, Sixteenth Judicial Circuit, Division 4, the Missouri Court of Appeals, Kansas City District and the Supreme Court of Missouri, en banc, are correctly set forth in Appendix "A" to the Jurisdictional Statement.

ARGUMENT

The Case Presents No Substantial Federal Question

The issue presented to the Supreme Court of Missouri by virtue of these proceedings was whether a constitutionally unacceptable judicial determination of obscenity by means other than a trial by jury can be cured by the process of allowing an appeal from such a determination by the Municipal Court of Kansas City, Missouri, the court of original jurisdiction, to the Circuit Court of Jackson County, Missouri, where a trial *de novo* by a jury is provided on appeal. Prior to the decision of *City of Kansas City* v. *Darby*, 544 S.W.2d 529 (Mo. banc 1976) (Juris. Statement, Appendix "A", p. 26) the Supreme Court of Missouri held in *McNary* v. *Carlton*, 527 S.W.2d 343 (Mo. banc 1975) that a jury determination of contemporary community standards is constitutionally required in determining obscenity under the First and Fourteenth Amendments to the United States Constitution. Clearly, Appellant is estopped from and has no standing to attack the decision rendered by the Supreme Court of Missouri in the case of *McNary* v. *Carlton*, supra. See 28 U.S.C. 1257; *Smith* v. *Indiana*, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125 (1903); *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 28 S.Ct. 275, 52 L.Ed. 450 (1908); *Marshall* v. *Dye*, 231 U.S. 250, 34 S.Ct. 92, 58 L.Ed. 206 (1913). Therefore, Appellant's first question, involving the precise issue decided by the *McNary* case, is without merit and should be dismissed for the reason that said question is not within the jurisdiction of this Court for purposes of these proceedings.

Appellant further contends in its first question that the Supreme Court of Missouri exceeded the authority granted to it under the Constitution of Missouri. Appellee submits

that said contention is misplaced for the reason that the constitutional provision referred to by Appellant, viz., Article V, Section 5 (Juris. Statement, Appendix "B", p. 39) pertains to the authority of the Supreme Court of Missouri to promulgate rules of practice and procedure for Missouri courts. Said provision has no relationship whatsoever to the authority of the Supreme Court to render decisions. Moreover, it is clear that whether or not a state court exceeded its functions under the state constitution cannot give rise to a question respecting due process of law which will sustain the appellate jurisdiction of this Court. *French* v. *Taylor,* 199 U.S. 274, 26 S.Ct. 76, 50 L.Ed. 189 (1905); *Rawlins* v. *Georgia,* 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899 (1906); *Burt* v. *Smith,* 203 U.S. 129, 135, 27 S.Ct. 37, 51 L.Ed. 121, 127 (1906).

On the basis of the foregoing, Appellee submits that Appellant's first question is without merit for the reasons that it is not within the jurisdiction of this Court and does not raise a substantial federal question.

Appellant suggests in its second question that the Missouri Supreme Court acted outside the scope of that which is constitutionally permissible by following this Court's decision in the case of *Callan* v. *Wilson,* 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888). Appellant contends that the *Callan* case has been overruled by this Court by reason of the dismissal, for want of no substantial federal question, entered in the case of *State ex rel. Cole* v. *Nigro,* 471 S.W.2d 933 (Mo. 1971), appeal dismissed, 404 U.S. 804, 92 S.Ct. 122, 30 L.Ed.2d 36 (1971). Appellee concedes that a dismissal for want of no substantial federal question is a decision on the merits of the case. *Hicks* v. *Miranda,* 422 U.S. 325, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223, 236 (1975). However, this Court concluded in the *Nigro* case that the appeal therein

had to be dismissed for the reason that the constitutional challenge to the Kansas City, Missouri Code of Ordinances, §22.1 (Juris. Statement, Appendix "B", p. 43) was not a substantial one. Such conclusion was a decision on the merits as to the questions presented therein; but it clearly, was not meant to overrule *any* prior decisions of this Court. Illustrative of that fact is the viability of the *Callan* case which this Court recognized as recently as June 30, 1976 in the case of *Ludwig* v. *Massachusetts,* ..... U.S. ....., 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976) wherein the Court noted the *Callan* holding and determined that it was not necessary that it be disturbed. Id., 96 S.Ct. at 2787, 49 L.Ed.2d at 741. When an alleged federal question rests upon a false assumption, it affords no basis for the exercise of this Court's jurisdiction over a state court. *Parker* v. *McLain,* 237 U.S. 469, 35 S.Ct. 632, 59 L.Ed. 1051 (1915).

In addition, the issue opted for by the relator in *State ex rel. Cole* v. *Nigro,* supra, is clearly distinguishable from the question raised by Appellee in the case below. The *Nigro* case presented the question of whether a defendant, regardless of the nature of the crime alleged to have been committed, is entitled to a trial by jury pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §22(a) of the Missouri Constitution. The question presented by Appellee in *City of Kansas City, Missouri* v. *Darby,* supra, was whether it is permissible in the first instance for a judge, rather than a jury, to determine in obscenity prosecutions the factual issues of obscenity under the guidelines set forth in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Supreme Court of Missouri held in response to the *Darby* question that it is not constitutionally permissible to allow a municipal judge to restrict freedom of expression without such a jury determination. Said holding is based on settled prin-

ciples set forth in previous decisions of this Court and of the Missouri Supreme Court. Therefore, Appellee submits that there is no substantial federal question present in Appellant's second question which forms a basis for review of the judgment of the Missouri Supreme Court by this Court. *Utley* v. *City of St. Petersburg*, 292 U.S. 106, 109, 54 S.Ct. 593, 78 L.Ed. 1155, 1158 (1934).

The third question presented by Appellant is that the First and Fourteenth Amendments to the United States Constitution do not require a trial by jury in obscenity prosecutions in the Municipal Court of Kansas City, Missouri. Appellant contends that the case of *Ludwig* v. *Massachusetts*, supra, is determinative of said question. This Court held in *Ludwig* that the Massachusetts "two-tier" court system did not violate the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments. In reaching its conclusion, this Court reviewed its previous decisions holding that a trial by jury is not *required* when an accused is charged with a "petty" offense, *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Baldwin* v. *New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) and that a jury of 12 is not *required* in criminal prosecutions, *Williams* v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970); *Apodaca* v. *Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). However, *Ludwig*, *Duncan*, *Baldwin*, *Williams* and *Apodaca* did not hold that it was constitutionally impermissible for a state to protect First Amendment freedoms by requiring that a trial by jury be made available in the first instance in obscenity cases. A state may choose the procedure it deems appropriate for the vindication of federal rights, unless such procedure closes the door to consideration of a claim that a federal right has been denied. *Young* v. *Ragen*, 337 U.S. 235, 238, 69 S.Ct. 1073, 93 L.Ed. 1333, 1336 (1949); *Loftus* v. *Illinois*, 334 U.S. 804, 68 S.Ct. 1212, 92 L.Ed. 1737 (1948). The jurisdiction of this Court to review the judgment of the Supreme Court of Missouri can be invoked only when a federal right which was claimed below was denied by its decision. *Parker* v. *McLain*, supra, 237 U.S. at 471, 59 L.Ed. at 1053 (1915). The judgment from which the appeal herein is taken did not deny federal rights, but rather provided for their vindication.

Appellant alleges that, by reason of the *Darby* decision, it has only two alternatives with respect to the enforcement of the Kansas City Obscenity Ordinance (Ordinance No. 39144, Juris. Statement, Appendix "B", pp. 43-45), viz.: (1) to cease prosecutions thereunder; or (2) to provide the right to trial by jury in such prosecutions in the Municipal Court of Kansas City, Missouri. Clearly, Appellant's assessment of its alternatives is erroneous. The city attorney for the City of Kansas City, Missouri has adequate remedies at his disposal to pursue the enforcement of obscenity violations under state statutes, without resorting to municipal court proceedings which deprive prospective defendants of due process of law. As was stated by the Missouri Supreme Court in *Darby* (Juris. Statement, Appendix "A", p. 32), the chief executive officer of Kansas City, or its city attorney, is a proper party to initiate proceedings under R.S.Mo. 1969, §563.285, which statute affords injunctive relief against the sale, distribution or publication of obscene material, while preserving the requisite due process protection of trial by jury. *McNary* v. *Carlton*, supra. Furthermore, the city attorney is likewise a proper party in actions for search and seizure of allegedly obscene material under the procedure outlined in R.S.Mo. 1969, §§542.281 and 542.301. The State of Missouri has provided adequate remedies for Appellant to utilize for the purpose of prosecuting alleged obscenity violations occurring within the corporate confines of Kansas City,

Missouri. Only when a state deprives a person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection and this Court's jurisdiction be invoked. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 72, 75 S.Ct. 614, 99 L.Ed. 897, 900 (1955). Therefore, Appellee submits that Appellant's third question presents no substantial federal question and accordingly, should be dismissed.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the questions presented by Appellant's jurisdictional statement, standing alone, are not jurisdictionally subject to review by this Court by way of appeal; and further, that said questions are so insubstantial as not to need or require further argument. Accordingly, Appellee respectfully moves this Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the case by the Supreme Court of Missouri.

Respectfully submitted,

THOMAS W. TIERNEY
DONALD V. PIERCE, JR.
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
Telephone: (816) 421-4334
Attorneys for Appellee